acts and practices that the Decree of December 9th, 1938, sought to remedy. The Court further held that it wouldn't make any difference whether the notices actually interfered with or restrained the employees, the Court saying that the notices had the purpose of interfering with and restraining the employees. (Tr. 62-66.)

The opinion of Court stated that a decree requiring respondents to take appropriate action to purge themselves of contempt by disavowing prior conduct and statements, and by assuring against further violations be presented. Thereafter, on February 15th, 1943, the Circuit Court entered a decree ordering respondents to purge themselves of contempt by distributing and posting a prescribed notice and by paying costs, including the cost of printing of the Labor Board's petition and brief. (Tr. 73.)

2.

STATEMENT AS TO JURISDICTION

This Honorable Court has the jurisdiction to grant this petition under the provisions of the Act of February 25th, 1925, Chap. 229, 43 Stat. 936, and particularly under Section 240 (a) of said Act, being also Section 240 (a) of the Judicial Code.

The following reasons justify the granting of this petition under the applicable rules of this Court:

(a) The Circuit Court of Appeals for the Fifth Circuit has decided a Federal question in a way possibly in conflict with the following applicable decisions of this Court:

N. L. R. B. v. Express Publishing Company, 321 U. S. 426, wherein this Court held that the National Labor Relations Act did not give the Circuit Courts the power to control by contempt, alleged violations of the Act which were not in controversy at the time of the enforcement decree and which were not similar or related to the unfair labor practices which the Board had theretofore found.

N. L. R. B. v. Virginia Electric & Power Company, 314 U. S. 469, wherein this Court held that interference, restraint or coercion of employees in their right to self organize, etc., is not established by proof of isolated utterances, separated from their background and from the surrounding circumstances.

Gompers v. Buck Stove, 221 U. S. 418, wherein this Court held that in a Civil contempt proceeding involving acts already committed, the only power of the Federal Court was to punish by a remedial fine commensurate with damages sustained by the adversary.

(b) Such decision is in conflict with the following decisions of another Circuit Court on the same matter:

N. L. R. B. v. Pacific Greyhound (9th), 106 F. (2d) 867, wherein it was held that a lapse of two years had an important bearing on the question of the existence of contemptuous conduct.

(c) Whether or not a Circuit Court having entered an enforcing decree in a Labor case should by contempt proceedings control future alleged violations of the Labor Act which are not connected with, related to or similar to the acts and practices which were involved in the original enforcement case, is an important question of Federal law having to do with the administration of the National Labor Relations Act, and such question should be settled by this Court.

Whether a Circuit Court in a contempt proceeding arising out of a Labor case can impose as a condition of purge for consummated contemptuous acts, punishments other than a remedial fine, is an important Federal question which should be settled by this Court.

(d) Under the accepted and usual course of Judicial proceedings, punishment for contempt of Court is considered a harsh remedy and it is required that the contemptuous act be established by clear and preponderating evidence and not by inference; and the Circuit Court of Appeals has departed from such accepted and usual course in this immediate case.

3.

QUESTIONS PRESENTED

First:—Where the National Labor Relations Board in 1938 found a specific violation of Section 8 (2) and Section 8 (3) of the National Labor Relations Act which entailed a finding of a technical violation of Section 8 (1), and where the enforcing decree of the Circuit Court of Appeals entered on December 9th, 1938, in addition to its provisions which affirmatively dealt with the violations of Section 8 (2) and Section 8 (3), included a general cease and desist order embodying the content of Section 8 (1); did such Circuit Court err in holding that notices posted and delivered 3½ years later, which had no connection with, relation to or similarity to unfair practices found in the original case, were in contempt of that portion of its prior decree which embodied Section 8 (1).

Second:—There being no facts in the record of undisputed evidence in this case showing the background under which the June notices were issued, and there being no facts in the record showing that such notices in any manner interfered with, restrained or coerced the employees in their right to self-organize, etc., but such facts showing to the contrary that there was and could have been no threat of restraint of, intimidation of or interference with the employees thereby; did the Circuit Court of Appeals for the Fifth Circuit err in holding that such notices had the purpose of interfering with, restraining or coercing the employees and that the notices were contemptuous.

Third:—Inasmuch as the nature of the punishment for contempt of a Circuit Court is prescribed by Statute (Section 268, Judicial Code, 28 U. S. C. A. 385); did the Circuit Court err in setting up as the condition for the purging of contempt, the performance of acts beyond what it had the power to impose as an actual punishment?

Fourth:—The Petition for the Rule to Show Cause was directed to American Manufacturing Company and "its officers and agents including particularly W. J. Gourley, its President, and W. H. Thompson". The petition did not set out any specific acts of the two individuals so particularly named but attributed the issuance of notices to respondents. A joint answer was filed by the company and the two named individuals as respondents. This answer denied that W. H. Thompson had any charge or control of the company operations and set out that he was not an officer or director of the company. The decree of December 9th, 1938, was against American Manufacturing Company only. On the basis of the record in this immediate case, and in the absence of a showing of the extent and manner in which these individuals participated in the alleged contemptuous acts, did the Circuit Court of Appeals for the Fifth Circuit err in adjudging the individuals, particularly Thompson, guilty of contempt.

4.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

First:—The very situation which this Court in anticipation sought to prevent and avoid by its ruling in the *Express Publishing Company* case, has occurred in this immediate case. The ruling of the Circuit Court in the immediate case is directly contrary to the ruling in the *Express Publishing Company* case. The irreconcilable conflict can best be demonstrated by quotations from the opinion in the Supreme Court case and we beg the indulgence of the Court in quoting therefrom at this point. In the *Express Publishing Company* case there had been a violation of Section 8 (5) of the National Labor Relations Act, and the Labor Board argued that the Company should in addition to the remedies relating to such violation, be also restrained from committing any acts which might be a violation of Section 8 (1). The Court said:

> "Yet if the contention which it (the Board) makes is to be sustained, subsequent violations of Section 8 (2) and Section 8 (3) which are also violations of Section 8 (1) may be the subject of a contempt order merely because respondent by the refusal to bargain has violated Section 8 (5) which is similarly a violation of Section 8 (1)."

At another point the Court said:

> "It is obvious that the order of the Board which when judicially confirmed, the Court may be called on to enforce by contempt proceedings, must like the injunction order of a Court, state with rea-

> sonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct."

And the Court further said:

> "In the light of these provisions we think that Congress did not contemplate that Court should, by contempt proceedings, try alleged violations of the National Labor Relations Act not in controversy, and not found by the Board and which are not similar or related to the unfair labor practice which the Board has found."

In the dissenting opinion Justice Douglas pointed out that the Publishing Company had not complained of the injunctive order embodying Section 8 (1) of the Labor Act and he questioned the right of the Supreme Court to consider such question. This dissenting opinion emphasizes the holding of the majority of the Court that the entering of a general restraint embodying the provisions of Section 8 (1) was beyond the authority of the Board and of the Court by enforcing decree.

In the American Manufacturing labor case which was determined in 1938, violations were found of Section 8 (2) and Section 8 (3) of the Labor Act. In answer to the contempt proceedings initiated in November of 1942, respondents therein (your petitioners) showed that there was no relationship or similarity

between the unfair labor practices found by the Board back in 1938 and the practices alleged to have occurred in June, 1942, and they argued that the cease and desist order of the 1938 decree which embodied Section 8 (1) of the Labor Act was not sufficiently specific to advise them what they were to refrain from doing. The Circuit Court, without discussion and without citation of authority, rejected and brushed aside this defense. Said Court thereby took direct issue with the ruling of this Honorable Supreme Court in the Express Publishing Company case.

Second:—Your petitioners, as respondents, in the contempt proceedings in the Circuit Court urged that the three June notices in themselves did not sufficiently prove interference, restraint and coercion, so as to sustain an adjudgement of contempt. The Circuit Court, again without citation of authority, rejected and brushed aside such contention. The Circuit Court said it was not necessary for there to have been a restraint, but that it was sufficient if the notices were issued for the purpose of interfering, restraining or coercing. Under this ruling, any utterance which any agent of American Manufacturing Company might make at any time in the future, could be similarly classified by the Circuit Court as having the purpose of interfering with, restraining and coercing. We submit that this is a dangerous ruling and is an unauthorized restriction on the right of free speech. In the Virginia Electric & Power case this Court refused to confirm a Labor Board finding of interference and restraint, which showed to have been based on utterances separated from their background.

Third:—Section 268 of the Judicial Code prescribes that punishment for contempt shall be by fine or imprisonment. The Gompers case clearly holds that in a Civil contempt action wherein past acts, as distinguished from continuing violations, are involved, the only punishment which a Court can assess is a fine of a remedial nature. In the immediate case the Circuit Court has found that the three notices issued in June, 1942, violated the Court's cease and desist order. No continuing violation was before the Court. With reference to the alleged violations charged to American's foremen, the charges were refuted by the answer and the Circuit Court did not find any violation. It is apparent that the only punishment which the Circuit Court can assess in this case is a fine commensurate with the damages sustained by the Labor Board, which would be the cost of printing its brief and answer. The present disposition of this case by the Circuit Court therefore raises a very important question. The said Court as a condition for the purge of contempt states that these petitioners (as respondents) shall post and distribute a prescribed notice advising the employees at American that they will not in the future molest or influence the employees, etc. Said notice also contains a statement that certain instructions have been issued to the supervisors and foremen. This in spite of the fact that the Circuit Court did not (and could not on the basis of the record) find that any foreman had acted in violation of the Court's original decree. The vacation of an adjudgment of contempt through the fulfillment of prescribed conditions of purge, is a subject which has been scantily touched

upon and never developed by the Federal Courts. Whether a Federal Court can say to the person whom it has found to have violated its decree, that it will excuse the contempt if he does thus and so, is a question which we have not found answered. The case *Re: Farkas*, 204 Fed. 343, states that an opportunity for purge should be given before any fine is imposed. However, we have found no treatise on the subject of purge by any Federal Court in particular connection with the Court's jurisdiction as limited by Section 268 of the Judicial Code. But if we can assume that the Court has the right to prescribe a method of purge, then is it within the authority of the Court, or is it a reasonable exercise of such authority, for the Court to prescribe a method of purge which is more severe than the punishment which the Court can impose? The Circuit Court in the immediate case requires, as a condition of purge, that assurances be given against future violations of its decree, even though the record does not show any continuing violations, and even though the Labor Board's petition for contempt does not charge that future violations impend. The Circuit Court requires, as a condition of purge, that the foremen be given instructions (or rather the Court requires that employees be notified that the foremen have been instructed) even though no transgressive acts of the foremen were found to have occurred. Can a Circuit Court insist that these petitioners in order to purge themselves of contempt and have the adjudgment of contempt vacated, perform acts which have no connection with the violations that the Court found. Clarification of the authority and jurisdiction of the Circuit

Courts to prescribe conditions of purge and of the limits of such authority in these labor cases is urgently needed at this time.

Fourth:—It is a general principle of law that contemptuous conduct must be shown by clear and preponderating evidence. The decree of December 9th, 1938, was against American Manufacturing Company only. Being a corporation, the decree necessarily applied to its officers and responsible agents. The Labor Board's Petition for a Rule in the immediate case named Gourley and Thompson as respondents, and thereafter by use of the inclusive term "Respondents" ascribed the issuance of notices to "Respondents." Thompson is not shown to have had any special connection with any of the notices. Thompson was not in charge or control of any of the Company's activities. We seriously question whether the Labor Board has sustained the burden of proof by showing that Thompson, merely because he was an employee of American, had so conducted himself to be in contempt of the Court's original order against the Company. There is no basis for the ruling of the Circuit Court that W. H. Thompson, as an indiivdual, violated its decree and that he was in contempt of court.

WHEREFORE, petitioners, individually and together, pray that this petition be granted and that this Honorable Court review on writ of certiorari, said decision of the said Circuit Court of Appeals for the Fifth Circuit, and that the decision of said Circuit Court of Appeals adjudging these petitioners in contempt, be reversed, and petitioners pray for such other and further relief as they may be entitled to.

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